Timely

MAY 28 1953

HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. 836.

24 DIGGER MERCHANDISING MACHINES, 1428 ROUGE BOXES, 16 METAL BOOTS, 71 POCKET KNIVES, 132 CIGARETTE LIGHTERS, 42 PENCILS, 98 FOUNTAIN PENS, 55 COMPACTS, 401 POTTERY DOGS, 16 METAL HORSES, 3 COMIC BUTTONS, 9 FLASHLIGHTS, 19 DICE, 2 BRACELETS, 11 WATCHES, 10 STEEL TAPES, 2 COMPASSES, 1 RAZOR AND 9 JEWEL BOXES, and LOYAL GEORGE STALEY, Intervener,

Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

MORRIS A. SHENKER,
408 Olive Street,
St. Louis, Missouri,
Counsel for Petitioners.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	2
Specification of errors	6
Reasons for granting the writ	7
Conclusion	22
Appendix	23

CITATIONS.

Cases:

France v. United States, 164 U. S. 676	11
Morgan v. United States (W. D. Ky.), 107 F. Supp. 501	22
Smith v. McGrath (D. Md.), 103 F. Supp. 286	22
United States v. Halseth, 342 U. S. 277	11
United States v. One Hundred Thirty-Nine Gambling Devices Alias Slot Machines (E. D. Ill.), 109 F. Supp. 23	22
United States v. 178 Gambling Devices, 107 F. Supp. 394 (S. D. Ill.)	22
United States v. Prock (S. D. Tex.), 105 F. Supp. 263	22
United States v. 65 Slot Machines (W. D. La.), 102 F. Supp. 922	22
United States v. 10, More or Less, Digger Machines (E. D. Mo.), 109 F. Supp. 825	22

United States v. Two (2) "Exhibit Rotary" Coin Operated Gambling Devices, 107 F. Supp. 314 (W. D. Okl.) 22
United States v. 200 Gambling Devices (E. D. La.), 103 F. Supp. 886 22

Statutes:

15 U. S. C. A. §§ 1171, 1172, 1176, 1177 .....2, 3, 7, 8, 12, 18, 20, 21
Act of January 2, 1951, P. L. No. 906, 64 Stat. 1134.. 3, 7
18 U. S. C. A. § 1301 .....11, 21
26 U. S. C. A. § 3267 .....17, 18, 21
28 U. S. C. A. § 1254 (1) 2

Miscellaneous:

H. Rep. No. 2679, 81st Cong., 2d Sess., 1950 U. S. Code Congressional Service, p. 4240.....12, 15
S. Rep. No. 1482, 81st Cong., 2d Sess. 12
S. Rep. No. 2375, 81st Cong., 2d Sess., 1950 U. S. Code Congressional Service, p. 3075.....17, 18
96 Cong. Record 13637-13656, 15101-15109, 15148-15369 .....16, 18
1950 U. S. Code Congressional Service, pp. 4245-4246 13
S. 3357, 81st Cong., 2d Session 13
H. R. 6736, 81st Cong., 2d Session 13, 14
U. S. Code Congressional Service, p. 4256 14
1950 U. S. Code Congressional Service, p. 4244 15

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. .....

24 DIGGER MERCHANDISING MACHINES, 1428 ROUGE BOXES, 16 METAL BOOTS, 71 POCKET KNIVES, 132 CIGARETTE LIGHTERS, 42 PENCILS, 98 FOUNTAIN PENS, 55 COMPACTS, 401 POTTERY DOGS, 16 METAL HORSES, 3 COMIC BUTTONS, 9 FLASHLIGHTS, 19 DICE, 2 BRACELETS, 11 WATCHES, 10 STEEL TAPES, 2 COMPASSES, 1 RAZOR AND 9 JEWEL BOXES, and LOYAL GEORGE STALEY, Intervener,
Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled cause on January 6, 1953.

OPINION BELOW.

The district court did not render a formal opinion, but made findings of fact and conclusions of law (R. 25-27). The opinion of the Court of Appeals (R. 32-40) is reported at 202 F. (2d) 647.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 6, 1953 (R. 40). A timely petition for rehearing was filed by petitioners, and this petition was overruled on April 14, 1953 (R. 67). The jurisdiction of this Court is invoked under 28 U. S. C. A., § 1254 (1).

QUESTIONS PRESENTED.

1. Whether a machine, which is not intended and constructed for coin operation at the time of shipment in interstate commerce, is subject to forfeiture as a gambling device, "designed and manufactured to operate by means of insertion of a coin," within the meaning of 15 U. S. C. A., § 1171 (a) (2), if several years before the enactment of this statute, the machine was constructed for coin operation.

2. Whether a machine which is operated in such a manner that property is delivered by forces within the control or substantial control of the individual operating the machine, is a device operated by the "application of an element of chance," within the meaning of 15 U. S. C. A., § 1171 (a) (2).

STATUTES INVOLVED.

The pertinent statutory provisions are printed in the appendix, infra, pp. 23-25.

STATEMENT.

A libel of information was filed against 24 machines and various articles contained in said machines, all of which had been seized by Government agents, and which are named in the style of this cause (R. 1). Prior to this seizure, these machines had been transported by petitioner

Staley from Audubon, Iowa, to Hot Springs, Arkansas. The libel charged that these machines and the articles contained therein were gambling machines within the meaning of 15 U. S. C. A., § 1171 (Act of January 2, 1951, P. L. No. 906, 64 Stat. 1134). The Government therefore prayed that the said articles should be declared forfeited to the United States under 15 U. S. C. A., § 1177.

Petitioner Loyal George Staley, the owner of the articles seized, intervened in the cause and filed his response and answer (R. 3), denying that these articles were gambling devices within the meaning of the statute referred to, denying that the machines were designed and manufactured to operate by means of a coin, token or similar object, denying that the machines were designed and manufactured so that when operating they might deliver money or property as a result of the application of an element of chance, and denying that he knowingly transported any gambling devices in interstate commerce. This cause was tried before the district court sitting without a jury (R. 4), and in addition to the introduction of certain pictures of the machines (R. 9-13), the only witness offered was the owner of the machines himself, who testified regarding the operation of the machines and, in the presence of the Court, dismantled one of the machines, demonstrated its working parts and principle, and actually operated the machine before the Court (R. 15-23).

The machines consist of a rectangular box, containing a miniature crane with a boom, and a claw at the end of the boom. Surrounding the crane assembly, on the floor of the machine, are scattered various small prizes (R. 9-13). After a customer had paid the prescribed rate to an attendant for playing the machine, the attendant would then trip a lever, which tripping would put the machine in gear and ready it for operation by the customer (R. 15). The player would then operate the same by turning a

crank at the center of the front of the machine, and by turning the crank, at a particular speed, the claw would be raised from its resting position and swung around to a desired position over one of the prizes, where it would descend to the floor of the machine and close. Further turning of the crank would cause the claw to be raised with any prize thus obtained and swung over to a chute where the prize would be dropped and delivered to the customer (R. 15-16).

Testimony was also given by the owner to the effect that the machines were originally coin-operated, and that the owner had removed the coin-operation device as soon as he acquired the machines during the period from 1946 to the summer of 1948 (R. 18-19). (The statute herein involved was enacted on January 2, 1951.)

At the conclusion of the evidence, the court made certain findings of fact and conclusions of law (R. 25-27). Inter alia, the court found that all of the machines in question were purchased prior to January 1, 1949, that the use of the slot for the insertion of a coin had been dispensed with, that at the time of the seizure of these devices they could not be operated by the insertion of a coin, token or similar object, and that the machines could not be operated until the customer gave an attendant a certain sum of money, that the attendant would thereafter pull a string, throwing the machinery into gear for operation by the customer. The court also found that the operation and result of the operation was dependent entirely upon the skill of the customer and that no operation of the machine was controlled by the machine itself or by any attached mechanism. The court found that the customer had exclusive control over the hooks or basket and that he could place the same anywhere he desired if he were skillful in the operation of the same. The court found that if the operator was careful and skillful he might recover various prizes from the machines but that such result was dependent upon his skill

and not upon the mechanism of the machine. The court also held that originally the machines contained a slot for the insertion of a coin but that the insertion of such coin did not automatically set the machine in operation but merely engaged the mechanism, and that the operation was left entirely to manipulation by the customer. There was therefore nothing automatic about the device other than merely placing it in gear for operation by the customer.

Among its conclusions of law the court held that the machines were not designed and manufactured to deliver money or property as a result of the application of an element of chance, that any prize that might be delivered by the machine's operation resulted from the application of skill on the part of the operator, that the machines were therefore not gambling devices under the pertinent statute, and that the libel should be dismissed and the property restored to the intervener.

The Court of Appeals reversed the decision of the district court and directed that the seized property be forfeited (R. 40). In so ruling, the court held that the question of whether the machines were intended and constructed for coin-operation at the time of their shipment in interstate commerce and at the time of their seizure was immaterial, and that the machines were subject to forfeiture if they were originally manufactured for coin-operation, even though the coin-operation was removed from these machines over two years prior to the effective date of the statute in question and the machines could not thereafter be operated by coin without a reconstruction process. The court also held in its ruling that the skill applied by a customer in the operation of a machine was immaterial, and that since an element of chance was involved in the machine's operation it came within the prohibition of the statute involved.

SPECIFICATION OF ERRORS.

The Court of Appeals erred:

1. In holding that the alteration of a coin-operated machine made prior to shipment in interstate commerce and several years prior to the effective date of the statute in question, by rebuilding it so that it is no longer coin-operated, does not change the manner in which the machine is designed and manufactured.

2. In holding that the question of whether the machine is coin-operated at the time of its shipment in interstate commerce and at the time of its seizure is immaterial in determining whether the machine is subject to forfeiture under the statute.

3. In construing the applicable statute so that the condition and construction of a machine at the time of its shipment in interstate commerce is immaterial.

4. In holding that a machine comes within the prohibition of the statute, if it is constructed so as to be merely "put in gear, or readied for operation" by the insertion of a coin.

5. In holding that the machines in question were operated by the application of an element of chance, and therefore were gambling devices within the prohibition of the statute.

6. In holding that in construing the statute, a comparison of the elements of chance and skill is immaterial and that if there is an element of chance involved, the transportation of the machines in interstate commerce is prohibited by the statute.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court of Appeals is clearly erroneous in giving a retroactive operation to the prohibitions of the statute in question. The Court held that the machines here seized were subject to forfeiture, notwithstanding that they were not intended and constructed for coin operation at the time of their shipment in interstate commerce, and though no changes in the devices were made from the time of the shipment to the time of the seizure. The Court held that the machines were to be condemned because in 1949, over two years prior to the enactment of 15 U. S. C. A., § 1171, the machines had been constructed for coin operation. The Court thus held that any transformation or rebuilding of a machine could not change its original nature, and that no matter how complete or basic an alteration may be, nevertheless the machine would not lose its stamp of coin-operation and therefore must be forfeited.

The Act of January 2, 1951, P. L. No. 906, 64 Stat. 1134, under which the instant cause was brought, forbids the shipment of gambling devices in interstate commerce. Criminal penalties are provided for its violation, and the articles whose transportation is forbidden are subject to forfeiture by the United States. The term "gambling device" is given a statutory definition at 15 U. S. C. A. § 1171. Subsection (a) (1) thereof includes within the term "gambling device" machines which have as an essential part a drum or reel with insignia. Under this subsection, whether or not a machine operates by the insertion of a coin or whether or not the machine itself delivers money or property is of no matter. Subsection (a) (2), under which the devices here involved were ordered forfeited, includes within the term "gambling device" a machine "designed and manufactured to operate

by means of insertion of a coin, token, or similar object and designed and manufactured so that when operated it may deliver, as the result of the application of an element of chance, any money or property. . . . " Under this subsection it is obvious that coin-operation is essential to bring a machine, which is not of the drum or reel type, within the prohibition of the statute.

The devices here in issue do not contain any drums or reels with insignia thereon, and so could not under any circumstances come under subsection (a) (1). Rather, they are what are commonly referred to as "digger machines" and consist of a bucket or scoop which, when properly guided, may pick up and release to the customer certain items of personal property. Thus, if they are to be held to come within the condemnation of the statute at all, they must be held to contain all of the elements set out in subsection (a) (2), which elements include both a coin insertion apparatus and a money or property delivery apparatus.

The construction placed on this statute by the Court of Appeals is to the effect that the test to be applied in determining whether a particular device is to be forfeited is the manner in which such device was originally "designed and manufactured," and that the character of the machine is immutable notwithstanding subsequent alteration. The Court has thus held that a machine or device can never be redesigned or remanufactured to come without the provisions of the forfeiture statute. Indeed, as applied to the facts of the instant case, the Court's ruling is held to apply to devices which were drastically redesigned and remanufactured long before the statute in question was enacted or even contemplated. Under this decision, we are led to the certainly unintended result that a machine, which is originally manufactured without coin operation, may be shipped from one State to another and escape the forfeiture provisions, notwithstanding it is

immediately upon arrival in the second State altered for coin operation. And, conversely, a machine, which is originally manufactured for coin operation but which is altered by removal of the coin operation, is subject to forfeiture if shipped in interstate commerce after such alteration. However, if the decision of the Court of Appeals is correct, to the effect that an alteration which removes a coin-operation cannot constitute a redesigning or remanufacturing of a machine, it must follow logically that an alteration which adds a coin-operation can also not constitute a redesigning or remanufacturing of a machine. If the rule announced by the Court be allowed to stand, the entire effectiveness of the legislation will be nullified, for in order to avoid the penalties of this statute, a party need only ship in interstate commerce a machine or device which has been originally manufactured without coin-operation, and thereafter in the State of arrival merely add a coin-operation to the machine. In this manner, under the decision of the Court of Appeals, no forfeiture or criminal liability could result. To permit such a result, and at the same time to hold that if the machine was originally constructed with coin-operation, such characteristic can never be removed, could not be held in accord with the intention of the Congress in the enactment of this legislation.

Rather, to give a proper construction to the language of this statute, it should be held that the test in determining whether a machine is subject to forfeiture is not the manner of its original manufacture or construction, but the intent with which the machine is shipped in interstate commerce, together with its make-up or construction at such time of shipment. Under such interpretation, the word "designed" used in the statute would mean "intended" to be used "by means of insertion of a coin," and the word "manufactured" would mean "built" or "constructed" for operation "by means of insertion of a coin."

In other words, this interpretation of the statutory language indicates that each of the words "designed" and "manufactured," as used in the statute, has its own and appropriate meaning, whereas under the Court's decision these two words have quite the same meaning, and no useful purpose would be subserved by the inclusion of both words in the statute. The merit of petitioners' interpretation of this language is illustrated by the fact that under this meaning a machine which is constructed for coin operation and is shipped in interstate commerce with the intent that it be used for coin operation would be subject to forfeiture. Further, under this interpretation, the effectiveness of the statute could not be nullified, as hereinabove described, for if a machine were assembled in a receiving State from parts shipped from another State with the requisite intent, the completed machine would also be subject to forfeiture. And, if parts capable of being assembled into a machine are shipped from one State to another without the intent described, the parts would properly not be subject to forfeiture.

To hold otherwise than is contended here by petitioners would amount to a discrimination against those machines which had been reconstructed prior to the effective date of the statute in question, by the removal of the coin apparatus and by rebuilding them so that they are no longer coin-operated. To hold that these machines should be forfeited is to hold that this statute operates retrospectively. Such an operation of a statute should never be approved or sanctioned by the Courts in the absence of express legislative authority within the very language of the statute. It is, of course, clear that legislation should be construed prospectively, and should never be construed to apply to past transactions or circumstances unless a clear mandate therefor can be found in the language of the statute. Nowhere in the instant statute is there any authority for the proposition that devices which are not

constructed for coin operation at the time of their shipment in interstate commerce and at the time of their subsequent seizure may be held to come within the forfeiture provisions of the statute. Similarly, the statute which prohibits the use of the mails in connection with lotteries, being 18 U. S. C. A., § 1301, has been interpreted by this Court to exclude both past and possible future lotteries. This statute was construed in the case of France v. United States, 164 U. S. 676, to have no applicability whatever to a past lottery. That decision of this Court, of course, was rendered many years before the passage of the statute which is presently in issue. And since Congress did not seek to expressly confer any retroactive nature on the statute passed in 1951, it must be held that Congress was aware of the decision of this Court in the France case and to have approved of a similar interpretation of the related statute which it was then enacting. Quite recently, in the case of United States v. Halseth, 342 U. S. 277, it was also held by this Court that the mailing of gambling paraphernalia that might be used to set up a lottery was not in violation of 18 U. S. C. A., § 1301, since the lottery prohibited in the statute must be an existing one at the time of the mailing of the paraphernalia. Obviously, therefore, without clear sanction or authority from the legislature, the statute presently before this Court ought not be held to include a device which may have come within the provisions of the statute long prior to the effective date of the statute, but which could presently have no relation to the types of devices prohibited therein.

2. The legislative history of the statute here in issue supports the petitioners' contention that the devices here seized do not come within the prohibitions of the statute. Rather, it is evident from a review of this legislative history that the real purpose or spirit of this legislation was the prohibition of gambling devices which are commonly and popularly known as "one-armed bandits." Subsection

(a) (1) of Section 1171 of the statute specifically refers to "slot machines" or other devices which contain a drum or reel with certain insignia thereon. Subsection (a) (2), which defines mechanical devices which come within the prohibition of the statute, should be read in conjunction with subsection (a) (1), and it becomes apparent that the second subsection refers to machines and mechanical devices similar in nature to those referred to in the first subsection. This fact is corroborated by the legislative history of the statute in question.

H. R. Rep. No. 2679, 81st Cong., 2d Sess., set out at 1950 U. S. Code Congressional Service, p. 4240, explains the origin and history of this statute and states that the primary purpose of the statute is the supporting of "the policy of those States which outlaw slot machines and similar gambling devices by prohibiting the use of the channels of interstate or foreign commerce for the shipment of such machines or devices . . ."

The bill was originally passed by the United States Senate and contained as a definition of the term "gambling device":

> "Any machine or mechanical device or parts thereof, designed or adapted for gambling or any use by which the user as the result of the application of any element of chance may become entitled to receive directly or indirectly anything of value."

This definition obviously was quite broad and the Senate Committee reporting on this legislation stated in its report (S. Rep. No. 1482, 81st Cong., 2d Sess., p. 3) that the definition of the term "gambling device" was made particularly broad in order to include within the prohibition of the statute those types of coin-operated machines which incorporate, along with the gambling, some element of skill which had previously been argued as distinguishing

those machines from outright gambling machines. The Senate Committee in its definition, therefore, expanded the term "gambling machine" to include any machine in which the application of any element of chance might entitle the user to become entitled to receive anything of value. This definition by the Senate Committee was later considered by the House Committee studying this proposed legislation, and it was concluded by this Committee that if such definition were permitted to stand in the completed bill, the statute "could possibly be construed to include pinball machines and similar devices which are played purely for amusement and which do not have pay-off devices which return to the player anything of value." This Committee, therefore, greatly limited the definition of the term and ultimately adopted the term as it exists in the completed statute. In so doing the Committee expressed itself as carrying out the intention of Congress "to exclude pinball machines and similar amusement machines as well as certain machines and devices commonly used, for instance, at carnivals and livestock shows." 1950 U. S. Code Congressional Service, pp. 4245-4246.

This House Committee conducted the only hearing held prior to the enactment of this legislation. (Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives on S. 3357 and H. R. 6736, 81st Cong., 2d Sess.) At this hearing certain representatives of coin machine manufacturers and amusement park and carnival operators appeared and informed the Committee of the danger of this legislation being construed under its prohibitions to include such things as pinball machines and certain exhibits and devices which are commonly used at arcades or carnivals. The Committee members themselves, however, indicated that it was not items which were ordinarily used for amusement which the legislation proposed to curb, but rather the slot machine rackets which had become widespread in the

country. Illustrative of this intention on the part of Congress as well as those interested in this legislation is the letter of Acting Secretary of Commerce Thomas C. Blaisdell, Jr., to the Chairman of the appropriate House Committee, which letter referred to the broadness of the Senate Bill's definition of "gambling device" and which further suggested that consideration should be given to a definition which distinguished between gambling devices and amusement devices. The letter went on to state that:

> "Such would, it is believed, be in accord with the apparent objectives of the bill to prevent commerce only in mechanical devices used in commercial gambling." (Hearings, supra, p. 7.)

Again, in the correspondence between the Director of the Budget Bureau and the Chairman of the House Committee, the Director stated that:

> "We do not believe that the definition should be so broad as to permit an interpretation which would include other devices now legal in many States and widely used at carnivals, bazaars, and fairs, such, for example, as wheels of chance." (U. S. Code Congressional Service, p. 4256.)

A broader bill, H. R. 6736, was also considered by the House Committee. It read in part:

> ". . . whoever shall knowingly transport or cause to be transported in interstate and foreign commerce any machine, apparatus, mechanical device, or any parts thereof, designed or adapted for the playing of any game of chance for money or other thing of value, or whoever shall receive, possess, or dispose of any article which has been transported in violation of this Act, knowing the same to have been transported, shall be guilty of a felony . . ."

It is apparent that this prohibition was considerably broader than the legislation as ultimately passed, and

that this bill, introduced by Representative Preston, was rejected for this reason. Representative Preston himself, however, was in accord with the ultimate purpose of the legislation and said:

> "The rule of common sense would apply to surely eliminate any item which is commonly known by common knowledge and common usage and common custom to be a thing of amusement rather than primarily a thing used for gambling purposes." (Hearings, supra, p. 19.)

H. R. Rep. 2679, in reporting the proposed legislation favorably, again indicated that the general purpose and intention of the legislation was the prohibition of devices known as "one armed bandits," over the operation of which a player or customer has no control, and that the legislation did not seek to prohibit the use of such items as pinball machines and other devices used at carnivals and livestock shows. This report also indicated the real purpose of this legislation as follows (1950 U. S. Code Congressional Service, p. 4244):

> "Your Committee has favorably reported this bill on the basis primarily of two considerations:
>
> "(1) as testified before your Committee, Nation-wide syndicates appear to derive substantial revenues from the operation of slot machines and similar gambling devices, and appear to put these revenues into other illegal enterprises with the resulting increase in crimes committed and corruption of public officials, all of which endanger our society; and
>
> "(2) slot machines and similar gambling devices appear to offer an opportunity for a particularly vicious form of gambling which 'does not give the sucker (many of whom incidentally are juveniles) a decent break.'

> "The number of slot machines and other gambling devices on which, in 1949, a federal license tax was paid as required by the Internal Revenue Code (26 U. S. C., Sec. 3267) is given as 69,000 machines. It is likely however that the number of machines in operation is at least twice this number."

Further enlightenment on the intent of Congress in the passage of this legislation may be had from a review of the Congressional debates which occurred prior to the passage of this Act. 96 Cong. Rec. 13637-13656, 15101-15109, 15148, 15369. Continual reference is made in these debates to the prohibiting of interstate shipment of slot machines and "one armed bandits" and to the fact that the legislation was not meant to cover amusement devices, vending machines and music boxes. For example, Senator Johnson who introduced the bill in the Senate referred to it as the so-called Slot Machine Act and to the intention of prohibiting the use of "one armed bandits." In answer to a question as to the difference between the Senate and House Bills which the conferees had resolved, Senator Johnson stated:

> ". . . The House struck out the definition of gambling devices contained in the original Justice Department bill and substituted a much more specific and narrow definition, the effect of which is to limit the bill exclusively to slot machines and to exclude from the bill pin-ball machines." 96 Cong. Rec. 15102.

Senator Johnson also referred in this debate to the fact that Nevada was the only State in the United States to which it was legal to send slot machines, and this reference is certainly indicative further of the fact that the type of machines here involved could not have been within the purview of the Act of Congress since these machines are apparently legal in many States and not merely in the State of Nevada. Senator Johnson stated further in op-

posing an amendment to the statute which would have permitted the use of slot machines on Army posts:

> "Frankly I do not see how the Congress can prohibit the interstate shipment of devices which everybody acknowledges as 'one-armed bandits' which do not give the customer an even break and at the same time permit and encourage their operation on Federal territory."

A review of this entire legislative history which surrounded the passage of this statute thus indicates that the legislature had in mind the suppression of such devices as slot machines and one-armed bandits which were the essentials of commercialized gambling, and that the legislature could not possibly have had in mind the innocuous carnival devices which have been seized in the instant case. The Court of Appeals decision obviously fails to take this legislative history into consideration and the decision is therefore directly opposed to the whole spirit of the Congressional enactment.

3. The relationship and meaning of this statute in the Federal scheme of regulation of gambling devices can be seen by reference to 26 U. S. C. A., § 3267. The latter statute places a tax on coin-operated amusement and gaming devices, and defines gaming devices as "slot machines which operate by means of insertion of a coin." That language is equivalent to the language in the statute here in question which defines "gaming device" as "any machine or mechanical device designed and manufactured to operate by means of insertion of a coin." Section 3267 was originally passed in 1941. On September 23, 1950, Congress increased the tax rate on amusement and gaming devices under that section. The report of the Senate which favorably reported that bill stated (S. Rep. No. 2375, 81st Cong., 2d Sess., 1950 U. S. Code Congressional Service, p. 3075):

"Under present law the occupational tax on coin-operated gaming devices is $100 per year per machine. The House Bill increases this tax to $150. The increase in this tax at the present time appears particularly appropriate in view of the fact that the Senate has recently passed a bill (S. 3357) barring interstate shipments of gaming devices.".

The machines involved in the instant case would not be included under the definition set out in Section 3267 since they did not operate by means of a coin and if Congress meant to include the same gaming devices, then clearly the machines here involved are also excluded under its provisions. Reference was made in the Congressional debates on the statute here in question to the increased tax on slot machines. 96 Cong. Rec. 15369. Therefore it is clear that Congress by its very Committee reports and debates constantly had in mind the gaming devices mentioned under Section 3267, that is, slot machines or one-armed bandits. The recent amendment of 26 U. S. C. A. § 3267, and the reference to that statute in the Congressional debates of the statute here in issue indicates that Congress intended to forbid the interstate shipment of gaming devices which were being taxed under Section 3267. The machines here in question are not taxable under said Section 3267, since they do not "operate by means of insertion of a coin . . ." Since these machines do not come within Section 3267, they also do not come within 15 U. S. C. A. 1171.

4. The statute under which this action was brought below condemns a device which delivers any money or property "as the result of the application of an element of chance." The Court of Appeals in its Opinion held that the machines here in issue were operated as the result of at least an element of chance, and that notwithstanding the fact that the machine may also have been operated by the skill of a customer, the machine was

nevertheless subject to the forfeiture provisions of the statute. The Court of Appeals thus held that so long as any element of chance, no matter how minute, was involved in the device's operation, a gambling device existed within the meaning of the statute. The proper interpretation of this statute, however, would be that the term "application of an element of chance" means the delivery of money or property by forces out of the control or substantial control of that person operating the machine. In view of the legislative history of this statute as set out in a prior section of this petition, the purpose of the statute was to prohibit the use and shipment in interstate commerce of slot machines or one-armed bandits. It must be apparent that the functioning of such type of machines is completely dissimilar from those with which the Court is here concerned. For, in the case of slot machines or one-armed bandits, after the insertion of a coin or other token, the customer is thereafter deprived of any effective control over the machine's operation. All remaining operation of the machine is dependent upon the forces within the mechanical device itself. In the instant case, as evidenced by the testimony adduced at the hearing in the district court and as stated by the Court of Appeals in its Opinion, control on the part of the customer in the manipulation of the bucket or scoop remains with the customer after the insertion of the coin, and the customer actually thereafter directs the movement, speed and direction of the boom by manipulating the handle which is provided for that purpose. This is not an instance where the scoop is placed over a particular article by the customer before the insertion of the coin so that after the coin is inserted the customer thereafter has no further control over the operation of the machine. Indeed under the finding of the district court (R. 27) and under the undisputed evidence produced before the district court the operation of the machine and the result of such operation in this case depended entirely upon the skill of the

customer and no operation of the machine was actually controlled by the machine itself or by any mechanism attached to the machine.

To hold that a machine comes within the prohibition of the statute if it is so constructed as to be merely "put in gear, or readied for operation" by the insertion of a coin is to ignore the true manner in which the machine operates. For if the coin is inserted by the customer and the machine thereby put in gear, nothing further will occur nor will the bucket or scoop move from its resting place unless the handle is operated by the customer. Certainly no chance exists in this operation for this is not an operation at all. Rather it is apparent that before a machine should be forfeited under this statute the element of chance involved in a machine's operation should be such an element of chance as causes the machine to be operated by forces over which the customer has no substantial control. The Court's ruling that a comparison of the elements of chance and skill involved is immaterial and that so long as any element of chance is involved, the machine is a gambling device, ignores the real manner in which the machine operates and the fact that an element of chance is involved does not take the real control over the machine's operation away from the customer operating the machine.

5. The questions presented in this cause are of importance in the administration of this statute in particular and the Federal gambling laws in general. The settlement of these questions by this Court on certiorari are plainly in the public interest. The statute here in issue, 15 U. S. C. A. § 1171 et seq., is of recent origin, having been enacted on January 2, 1951, and as illustrated by the interpretation placed thereon by the Court of Appeals, can have a broad and far-reaching scope and effect. If the decision of the Court of Appeals be permitted to stand, a tremendous number of ordinary amusement and carnival

devices will be held to come within the forfeiture provisions of this statute, and a great many persons who deal in these articles will be subject to the criminal provisions of the statute. Further, it should be noted that Section 1173 of this Act requires every manufacturer and dealer in "gambling devices" to register certain information regarding his business and transactions with the Attorney General, and Section 1171, Subsection (a) (3), includes within the definition of the term "gambling device" any subassembly or essential part intended to be used in the described type of mechanical device. Under the decision of the Court of Appeals, the question of forfeiture and criminal liability under the statute will depend on the original construction and make-up of the property. Certainly, a dealer cannot easily know whether merchandise which perhaps has been rebuilt was originally constructed so as to come within the provisions of the statute, or whether his transactions with such property will subject him to possible criminal sanctions. Nor indeed can such dealer know whether he is liable to the registration provisions of the statute, nor whether he is subject to the tax imposed on coin-operated amusement and gaming devices under 26 U. S. C. A. § 3267. The great confusion thus resulting would be avoided by a review of the decision of the Court of Appeals, and an authoritative ruling by this Court.

Furthermore, as indicated in a prior section of this Petition, 18 U. S. C. A. § 1301, known as the lottery statute, has been interpreted to be applicable only in reference to existing lotteries, and to have no reference to past or future lotteries. The decision of the Court of Appeals, if permitted to stand, will upset this pattern of Federal administration of the gambling statutes, especially since there is no indication in the statute of an intention on the part of Congress to alter the prior interpretation of these statutes.

This Court should also take cognizance of the fact that this statute has been the subject of a great deal of litigation in the district courts relative to the interpretation of its provisions,* and that a great many persons are likely to be affected by the ruling here questioned. Finally, this Court should grant certiorari herein in order to review a decision which construes a penal statute to have a retroactive effect without any clear legislative mandate authorizing such construction.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MORRIS A. SHENKER,
Counsel for Petitioners.

---

* United States v. 65 Slot Machines (W. D. La.), 102 F. Supp. 922; Smith v. McGrath (D. Md.), 103 F. Supp. 286; United States v. 200 Gambling Devices (E. D. La.), 103 F. Supp. 886; United States v. Prock (S. D. Tex.), 105 F. Supp. 263; United States v. Two (2) "Exhibit Rotary" Coin Operated Gambling Devices, 107 F. Supp. 314 (W. D. Okl.); United States v. 178 Gambling Devices, 107 F. Supp. 394 (S. D. Ill.); Morgan v. United States (W. D. Ky.), 107 F. Supp. 501; United States v. One Hundred Thirty-nine Gambling Devices Alias Slot Machines (E. D. Ill.), 109 F. Supp. 23; United States v. 10, More or Less, Digger Machines (E. D. Mo.), 109 F. Supp. 825.

APPENDIX.

15 U. S. C. A.:

Sec. 1171. **Definitions.**

As used in this chapter—

(a) The term "gambling device" means—

(1) any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(2) any machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token, or similar object and designed and manufactured so that when operated it may deliver, as the result of the application of an element of chance, any money or property; or

(3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device . . .

* * * * * * *

Sec. 1172. **Transportation of gambling devices as unlawful; exceptions; authority of Federal Trade Commission.**

It shall be unlawful knowingly to transport any gambling device to any place in a State, the District of Columbia, or a possession of the United States from any place outside of such State, the District of Columbia, or possession; PROVIDED, That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of

such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section . . .

* * * * * * * *

Sec. 1176. **Penalties.**

Whoever violates any of the provisions of sections 1172-1174 or 1175 of this title shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Sec. 1177. **Confiscation of gambling devices and means of transportation; laws governing.**

Any gambling device transported, delivered, shipped, manufactured, reconditioned, repaired, sold, disposed of, received, possessed, or used in violation of the provisions of this chapter shall be seized and forfeited to the United States. All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this chapter, insofar as applicable and not inconsistent with the provisions hereof.

* * * * * * * *

26 U. S. C. A.:

Sec. 3267. **Tax on coin-operated amusement and gaming devices.**

(a) Rate. Every person who maintains for use or permits the use of, on any place or premises occupied by

him, a coin-operated amusement or gaming device shall pay a special tax as follows:

(1) $10 per year in the case of a device defined in clause (1) of subsection (b);

(2) $250 per year, in the case of a device defined in clause (2) of subsection (b); and

(3) $10 or $250, as the case may be, for each additional device so maintained or the use of which is so permitted. If one such device is replaced by another, such other device shall not be considered an additional device.

(b) Definition. As used in this Part, the term "coin-operated amusement or gaming devices" means (1) any amusement or music machine operated by means of the insertion of a coin, token, or similar object, and (2) so-called "slot" machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive, cash, premium, merchandise, or tokens. The term does not include bona fide vending machines in which are not incorporated gaming or amusement features . . .

* * * * * * * *

HAROLD B. WILLEY, Clerk

No. 836

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

---

24 DIGGER MERCHANDISING MACHINES, 1428 ROUGE BOXES, 16 METAL BOOTS, 71 POCKET KNIVES, 132 CIGARETTE LIGHTERS, 42 PENCILS, 98 FOUNTAIN PENS, 55 COMPACTS, 401 POTTERY DOGS, 16 METAL HORSES, 3 COMIC BUTTONS, 9 FLASHLIGHTS, 19 DICE, 2 BRACELETS, 11 WATCHES, 10 STEEL TAPES, 2 COMPASSES, 1 RAZOR AND 9 JEWEL BOXES, AND LOYAL GEORGE STALEY, INTERVENER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 836

24 DIGGER MERCHANDISING MACHINES, 1428 ROUGE BOXES, 16 METAL BOOTS, 71 POCKET KNIVES, 132 CIGARETTE LIGHTERS, 42 PENCILS, 98 FOUNTAIN PENS, 55 COMPACTS, 401 POTTERY DOGS, 16 METAL HORSES, 3 COMIC BUTTONS, 9 FLASHLIGHTS, 19 DICE, 2 BRACELETS, 11 WATCHES, 10 STEEL TAPES, 2 COMPASSES, 1 RAZOR AND 9 JEWEL BOXES, AND LOYAL GEORGE STALEY, INTERVENER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 32-40) is reported at 202 F. 2d 647.

JURISDICTION

The judgment of the Court of Appeals was entered on January 6, 1953 (R. 40), and a petition for a rehearing (R. 41-58) was denied on April 14, 1953 (R. 67). The petition for a writ of certiorari was filed on May 28, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the seized machines were gambling devices within the purview of 15 U.S.C. 1171(a)(2).

STATUTES INVOLVED

15 U.S.C. 1171 (64 Stat. 1134) provides in pertinent part:

As used in this chapter--
(a) The term "gambling device" means--

(1) any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(2) any machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token, or similar object and designed and manufactured so that when operated it may deliver, as the result of the application of an element of chance or property; or

(3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device.

15 U.S.C. 1172 (64 Stat. 1134) provides:

It shall be unlawful knowingly to transport any gambling device to any place in a State, the District of Columbia, or a possession of the United States from any place outside of such State, the District of Columbia, or possession: Provided, That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section.

Nothing in this chapter shall be construed to interfere with or reduce the authority, or the existing interpretations of the authority, of the Federal Trade Commission under the Federal Trade Commission Act.

15 U.S.C. 1177 (64 Stat. 1135) provides:

Any gambling device transported, delivered, shipped, manufactured, reconditioned, repaired, sold, disposed of, received, possessed, or used in violation of the provisions of this chapter shall be seized and forfeited to the United States. All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims

and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this chapter, insofar as applicable and not inconsistent with the provisions hereof: Provided, That such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of gambling devices under this chapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

26 U.S.C. 3267 provides:

(a) Rate.

Every person who maintains for use or permits the use of, on any place or premises occupied by him, a coin-operated amusement or gaming device shall pay a special tax as follows:

(1) $10 per year in the case of a device defined in clause (1) of subsection (b);

(2) $250 per year, in the case of a device defined in clause (2) of subsection (b); and

(3) $10 or $250, as the case may be, for each additional device so maintained or the use of which is so permitted. If one such device is replaced by another, such other device shall not be considered an additional device.

(b) Definition.

As used in this Part, the term "coin-operated amusement and gaming devices" means (1) any amusement or music machine operated by means of the insertion of a coin, token, or similar object, and (2) so-called "slot" machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive, cash, premium, merchandise, or tokens. The term does not include bona fide vending machines in which are not incorporated gaming or amusement features. For the purposes of this section, a vending machine operated by means of the insertion of a 1 cent coin, which, when it dispenses a prize, never dispenses a prize of a retail value of, more than 5 cents, and if the only prize dispensed is merchandise and not cash or tokens shall be classified under clause (1) and not under clause (2).

STATEMENT

On December 28, 1951, the United States filed, in the District Court for the Western District of Arkansas, a libel of information, under 15 U.S.C. 1177, for the forfeiture of 24 machines and sundry articles seized therewith (as described in the caption herein), on the ground

that such machines and its contents were gambling devices within the meaning of the terms of 15 U.S.C. 1171, and that they had been transported, on September 18, 1951, from Audubon, Iowa to Hot Springs, Arkansas, in violation of 15 U.S.C. 1172 (R. 1-2). Petitioner Staley intervened as owner of the equipment, which he admitted shipping in interstate commerce as charged in the libel, but prayed for their return on the ground that they were not gambling devices within the statutory meaning (R. 3-4).

At the trial (R. 4-25), which was without a jury, the sole issue, as agreed upon by the parties, was whether the machines, involved were such gambling devices (R. 5).

The machines are rectangular cases with glass sides, each of which houses a model crane, having a boom with claws suspended by a chain at the end thereof, patterned after those commonly used in excavation work, mounted upon a swivel below which the case is filled with popcorn and interspersed with sundry merchandise of the type described in the caption, valued from 20 cents to $1.20 each (R. 7, 19-20; Gov. Exs. 1-3, R. 8, 9-13).

Petitioner Staley, who was the only witness at the trial (R. 15-23), testified that originally the machines were designed and manufactured as coin operated machines, but upon his acquisition thereof he removed the coin devices and remodeled the machines to permit their actuation by a manual tripping of a lever (R. 18-19). He used the machines at carnivals, where an attendant, upon being paid 10 cents, would, by tripping a lever, permit a customer one complete operation of the crane by means of a crank in front of the machine (R. 16, 19, 20, 15).[1/] According to petitioner Staley, the object in playing the machine is

---

1/ The only difference in the operation of the machines before and after remodeling was that before remodeling a coin tripped the engaging lever, whereas after remodeling this was done manually (R. 18).

to attempt to pick up one of the miscellaneous articles lying upon the popcorn by means of the claws suspended from the boom of the crane and to cause the article to be delivered to the player through the chute located to the player's left as he faces the machine (R. 15).

In the operation of the machines the following mechanical principle is involved:

The manual tripping of a lever in the back of the machine merely engages the crank shaft with the gears connected to the crane, boom and claw assembly, thus permitting the player to operate the crane by turning the crank in front of the machine (R. 16). All movements of the crane, except its predetermined stopping points, are controlled by the manipulation of the crank by the player (R. 21, 23). The turning of the crank moves the boom from its starting position over the chute on the left to one of five or six mechanically predetermined stopping points, which rotate with each successive operation, making a complete cycle every five or six operations (R. 15, 16, 17, 21). Continued cranking is required to cause the claws to descend, close, ascend, return to its starting position, release into the chute as a prize any object it may have picked, and thus complete one operation (R. 17). The behavior of the crane, such as the swinging rhythm of its boom and claw assembly, is dependent upon the manner and speed with which the crank is turned (R. 16, 21).

Petitioner Staley admitted that his profit depended on the fact that ordinarily an average player would not be successful in obtaining a prize on the first few operations of the machine (R. 20). He testified that a player's success depended entirely upon his dexterity in manipulating the crank (id.). In his two attempts to demonstrate to the trial court his skill in operating the machines, Staley failed to retrieve any object from the machine (R. 16, 17).

The trial court found, inter alia, that petitioner purchased the machines prior to January 1, 1949; that they "were originally designed and manufactured to be used by the insertion of a coin, token, or similar object," insertion of which "did not automatically set the machines in operation; that the "use of the slot for the insertion of a coin was entirely dispensed with * * * so that when these devices were seized there was no way in which to insert a coin, token or similar object and the devices could not be operated until the customer paid the attendant," who tripped an operating lever; that the "operation and the result of the operation depended entirely upon the skill of the customer and no operation of the machine was controlled in any manner by the machine itself or by any mechanism attached thereto"; and that the machines were transported in interstate commerce subsequent to January 2, 1951 (R. 26-27). It concluded that the "machines and property seized were not designed and manufactured to deliver money or property as the result of the application of an element of chance," and therefore the machines "were not gambling devices" within the meaning of 15 U.S.C. 1171 (R. 27). Judgment was entered dismissing the libel and ordering the release of the property seized (R. 28).

On appeal by the Government, the Court of Appeals reversed (R. 40). In holding that the machines were gambling devices within the purview of the statute, the court below stated, (1) that "it is immaterial whether the machines actually operate by insertion of a coin at the time they are accused because the statute makes the test how the machines were 'designed and manufactured'", and (2) that "in construing the statute, comparison of the elements of chance and skill is immaterial. The statute refers to a machine so designed that it will deliver property 'as the result of the application of an element of chance'", and "the fact that skill in operating the particular machine is helpful in attaining the end sought does not take the machine out of the type defined by the statute" (R. 37, 39-40).

1. Petitioners contend (Pet. 7-11) that, even though a machine may have originally been designed and manufactured to operate by means of insertion of a coin, it does not come within the purview of 15 U.S.C. 1171(a)(2), defining the "gambling devices," which 15 U.S.C. 1172 prohibits from transportation in interstate commerce, unless at the time of such transportation the machine is adapted for operation by insertion of a coin and intended to be so used. They argue that the issue of whether a particular machine is a gambling device within the statutory meaning depends, not on "the manner of its original manufacture or construction, but the intent with which the machine is shipped in interstate commerce, together with its make-up or construction at such time of shipment" (Pet. 9-10). It is clear, however, as the court below held, that "the statute makes the test how the machines were 'designed and manufactured,'" i.e., the purpose for which it was intended at the time of its manufacture (R. 37). The intent of the shipper is not material as long as the devices are intrinsically such as Congress intended to keep out of interstate commerce. See United States v. 65 Slot Machines, 102 F. Supp. 922 (W. D. Ia.).[2/]

There is no substance in the argument (Pet. 7-8), that in ruling against petitioners the court below held that a machine once designed and manufactured as a gambling device could "never be re-designed or remanufactured to come without the provisions of the forfeiture statute," "no matter how complete or basic an alteration" is made thereon. There was no issue as to whether the machines

---

2/ With respect to devices which are not intrinsically designed and manufactured for gambling purposes but are adaptable for such purposes, as are many mechanical parts and even coin-slots going to make up gambling devices, Congress extended the definition of "gambling devices" in subdivision (3) of section 1171(a), to include "any subassembly or essential part intended to be used in connection with any machine or mechanical device." It thus expressly made the intent of the shipper the test in determining whether such dual purpose mechanical parts should be excluded from interstate commerce. This was necessary in order not to exclude from commerce devices intended for innocent uses and at the same time prevent the possible defeat of the statutory purpose by persons shipping gambling devices in disassembled parts.

involved in the instant case were substantially altered from their original design. Except for evidence showing the elimination of coin slots from the machines, there was no evidence showing that they were basically rebuilt or drastically changed from their original design and manufacture. Their adaptation for operation without the insertion of a coin, still left them basically "designed and manufactured" for such operation. The mere removal of the coin-operating mechanism, which could readily be reintroduced at any time, did not constitute such a redesign or remanufacture of the machines as to take them out of the statute.

Petitioners' contention (Pet. 17-18) "that Congress intended to forbid the interstate shipment of gaming devices which were being taxed under" 26 U.S.C. 3267, and since the machines involved herein, being non-coin-operated, are not taxable thereunder, they also do not come within the purview of 15 U.S.C. 1171, is untenable. It is clear that Congress did not intend to limit its definition of "gambling devices" under section 1171 to coin-operated gaming machines, for under subdivision (a)(1) thereof, in addition to the "so-called 'slot machine,'" it includes "any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon," thus, necessarily encompassing all such drum or reel devices whether coin-actuated or not.[3/]

3/ The claim (Pet. 10-11), that reference to the original design and manufacture of the machines as coin-operated even though the coin-operating devices were removed therefrom before the enactment of the anti-gambling devices statute, resulted in discrimination and retroactive application of the statute, is specious. Except for its proscription of the manufacture of "gambling devices" in the District of Columbia and the possessions and territories of the United States, the statute does not outlaw any gambling devices, whether manufactured prior to or after the enactment of the statute. 15 U.S.C. 1172 merely prohibits their transportation in interstate commerce since its enactment, and its prohibitions and confiscatory provisions apply uniformly to defined "gambling devices," moving in such commerce, irrespective of the time of their design and manufacture. Its confiscatory provisions do not apply to "gambling devices," which had been transported in interstate commerce prior to its enactment.

2. Petitioners also contend (Pet. 18-20) that since, after the actuation of the machines for operation, effective control over its operations remained with the operator and not in uncontrolled mechanical forces within the machines, any element of chance involved in the delivery of any property as the result of the player's manipulations, was insufficient to bring the machines within the purview of the definition of "gambling devices." The statute however includes any machine, which, in addition to being designed for coin-operation, is "designed and manufactured so that when operated it may deliver, as the result of an element of chance, any money or property." It seems clear therefore, as the court below held, that so long as an "element of chance" is involved in the delivery of a prize, the machines come within the statutory definition of gambling devices.

Legislative history shows that Congress intended to include such machines in its definition of gambling devices. In its report on the bill as originally introduced in the Senate, the Senate Committee, in referring to the definition of gambling devices, stated (S. Rep. No. 1482, 81st Cong., 2d sess., pp. 3-4):

> * * * The meaning of "gambling" is well understood in every jurisdiction, and no definition of it is required. However, there are a number of types of the coin-operating machines which incorporate, along with the gambling, some element of skill or return of fixed value which in the past has been argued as distinguishing them from outright gambling machines. The States have usually rejected such evasions in court decisions or by statutes drawn to meet the situations. Accordingly, the definition has been expanded along the lines of the prohibitions made by the States, incorporating the basic distinguishing element that differentiates gambling devices from legitimate vending machines, namely the application of any element of chance in their use by which the user may become entitled to receive anything of value.

Although the Committee of the House of Representatives amended the original Senate definition of gambling devices by substituting the present definition, such amendment did not detract from the Senate Committee's original view to include machines having "any element of chance" in delivering property upon a play thereof. H. Rep. No. 2769, 81st Cong., 2d sess., pp. 5-6.

The amendment adopted by the House Committee was solely for purpose of excluding from the class of "gambling devices," "pinball machines and similar devices," such as music or "juke" boxes, "which are played purely for amusement and which do not have pay-off devices which return to the player anything of value," as well as certain machines and devices commonly used at carnivals, bazaars and livestock shows, such as "wheels of chance" (id. at p. 7).[4/]

The evidence shows that some element of chance was involved in the machines' delivery of property upon a play thereof. As the court below pointed out (R. 38-39), in view of the mechanically predetermined stopping places of the cranes' boom, it would be purely a matter of chance, at least to one playing for the first time that the boom would stop at the place of the object for which the player intended to play. And, as the court further pointed out (R. 39), even after the boom stops at the desired spot, whether a particular object can be seized by the claws depends on its position in relation to the prize, while a slight rotation of the claws at the end of the chain, which could not possibly be within the player's control, could easily get into a wrong position for seizing a desired item. Petitioner Staley admitted that the odds were against the player at least from the beginning and that the odds decreased in direct proportion to the proficiency of the player. But even a skilled player, due to a lack of accurate control over all the factors involved in delivering some merchandise from the machines, must rely on some degree of chance in

---

4/ Petitioners' contention (Pet. 11-17), that the legislative history shows that only "slot machines" of the type commonly known as "one-armed bandits" were intended to be prohibited from interstate commerce and not any others in the operation of which an element of skill or a mixture of chance and skill is involved, is without substance. Congress clearly intended to define a broader class of gambling devices. Although, as petitioners point out (Pet. 16), Senator Johnson, in referring to the House amendment of the definition of gambling devices to the bill he originally introduced, stated, in a congressional debate, that the effect of the amendment was "to limit the bill exclusively to slot machines and to exclude from the bill pin-ball machines," he concluded that the definition was "still broad enough to include machines which do not pay off in cash but which pay off in merchandise." 96 Cong. Rec. 15102.

Furthermore, had Congress intended to limit its definition of gambling devices to the type known as "one-armed bandits," then subdivision (2) of section 1171(a) would have been superfluous.

"beating" the machine. The machines cannot be considered as vending machines, since they do not sell anything, nor as bona fide amusement machines, since they do not attract players merely for amusement, but also for the hope of getting something of greater value than the fee paid for the privilege of playing. As the court below (R. 38), quoting from an unreported case, stated, "They are in fact and for all practical purposes, i.e., profit to the owner and loss to operator or public, a game of chance."

CONCLUSION

The judgment below is correct, there is no conflict of decisions and the petition for a writ of certiorari presents no questions warranting review by this Court. It is therefore respectfully submitted that the petition should be denied.

ROBERT L. STERN,
Acting Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
EDWARD S. SZUKELEWICZ,
Attorneys.

JUNE 1953.